

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GURNEY L. CURTIS and U.S. POSTAL SERVICE,
POST OFFICE, Las Vegas, Nev.

*Docket No. 97-1167; Submitted on the Record;
Issued January 20, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On May 26, 1993 appellant, then a 57-year-old custodian, filed a notice of traumatic injury and claim for compensation alleging that on May 25, 1993 he felt a sting in his left shoulder when he picked up a trash can to empty in the dumpster at work. The employing establishment indicated that appellant did not stop work. He was treated at the Las Vegas Medical Center for left shoulder strain and was released for light duty. The Office accepted the claim for left shoulder strain. Appellant was released for regular work on June 6, 1993.

Appellant filed a claim for recurrence of disability on October 30, 1995, noting that he still had symptoms of dull pain, stiffness and popping in his left shoulder related to his accepted employment injury.

On November 14, 1995 the Office advised appellant to submit medical evidence addressing the causal relationship between the alleged recurrence of disability and his accepted employment injury.

In a decision dated December 18, 1995, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence was insufficient to establish that appellant had a medical condition causally related to his May 25, 1993 work injury.

On May 16, 1996 appellant filed a request for reconsideration.

In conjunction with his request for reconsideration, appellant submitted a November 8, 1995 report from Dr. John M. Bowman, a Board-certified orthopedic surgeon. Dr. Bowman noted appellant's prior left shoulder injury and appellant's contention that it had caused him continuing pain. He diagnosed rotator cuff tendinitis of the left shoulder with possible rotator

cuff tear. Dr. Bowman offered no opinion as to the etiology of appellant's condition. In a subsequent treatment note dated November 29, 1995, Dr. Bowman reported that a magnetic resonance imaging (MRI) revealed a partial rotator cuff tear as well as some impingement. He recommended steroid injections, but again did not offer an opinion on causation.

In a report dated April 16, 1996, Dr. Richard R. Briggs, a Board-certified orthopedic surgeon, noted that appellant injured his left shoulder in May 1993 when he was pulling on a small trash can, emptying it into the dumpster and felt a sudden pain in his left shoulder. Dr. Briggs stated that "the exact mechanism of his injury is difficult to explain, except that he had sustained a twisting injury of the rotator cuff in the process of disengaging and emptying the trash into the dumpster. The pain was located in the subacromial region and seems to have remained pretty much constant in that area over the intervening years." Dr. Briggs reported that x-rays confirmed left shoulder rotator cuff impingement syndrome and degenerative joint disease of the acromioclavicular joint. He placed appellant on a restricted work program with no lifting above shoulder level or over 50 pounds.

In an August 26, 1996 decision, the Office denied appellant's request for merit review. The Office specifically considered appellant's new medical evidence to be irrelevant and immaterial, noting appellant failed to provide a reasoned medical opinion that his diagnosed condition was due to his accepted work injury of May 25, 1993.

The only decision that the Board may review on appeal is the Office's August 26, 1996 decision, denying reconsideration on the merits. This is the only final decision issued by the Office within one year of the filing of appellant's appeal on February 11, 1997.¹

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration on the merits.

Section 8128(a) of the Federal Employee's Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.² The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.³ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵ Evidence that repeats or duplicates evidence already

¹ 20 C.F.R. § 501.2(c); 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Id.* § 10.138(b)(1).

⁵ *Id.* § 10.138(b)(2).

in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁶ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁷ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.⁸

In the instant case, the Office denied appellant's reconsideration request on the grounds that the evidence submitted by appellant failed to address the issue of causal relationship and, therefore, appellant was not entitled to a merit review of the December 18, 1995 decision. In support of his request for reconsideration, appellant submitted an MRI report and the reports of Drs. Bowman and Briggs. Although the Office correctly found that Dr. Bowman did not offer an opinion as to the causal relationship between appellant's alleged recurrence of disability and his accepted employment injury, the Office improperly considered Dr. Briggs' opinion to be irrelevant and immaterial to the issue of causal relationship. Dr. Briggs' report was not previously of record and suggests that appellant has rotator cuff impingement syndrome and degenerative joint disease of the acromioclavicular joint, confirmed by x-ray, which he attributes to appellant's accepted work injury of May 25, 1993. Dr. Briggs explained to some extent that appellant had originally sustained a twisting injury of the rotator cuff in May 1993 while disengaging and emptying the trash into the dumpster. He further noted that appellant's left shoulder pain had remained pretty much constant in that area over the intervening years. While Dr. Briggs' opinion arguably may not be sufficient to carry appellant's burden of establishing causal relationship, that is not the proper standard for determining whether a case should be reopened for merit review. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence, which may be necessary to discharge his or her burden of proof.⁹ Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent evidence not previously considered by the Office.¹⁰

In view of the foregoing, the case shall be remanded to the Office to review the entire case record, including Dr. Briggs' April 16, 1996 report. After such further development as the Office deems necessary, the Office shall issue a *de novo* decision on the merits of the case.¹¹

⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁹ *Joseph E. Cabral*, 44 ECAB 152; *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ *Id.*

¹¹ Dr. Briggs noted in his April 16, 1996 report that appellant was treated at Fremont Medical Center and Nellis Air Force Base for left shoulder pain during the three years since the accepted work injury. These medical records should be requested by the Office; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.6(d).

The decision of the Office of Workers' Compensation Programs dated August 26, 1996 is set aside and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
January 20, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member